United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

IN REPLY REFER TO:
7202.4-OS-2018-00959

February 11, 2019

Via email: ychi@earthjustice.org

Yuting Chi
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202

Re: Sierra Club and Friends of the Earth v. U.S. Department of the Interior, 3:18-cv-03799

Dear Ms. Chi:

On April 2, 2018, Ms. Marta Darby of Sierra Club and Ms. Nicole Ghio of Friends of the Earth filed a Freedom of Information Act (FOIA) request seeking the following:

1. All records reflecting any communication, written or verbal, to any Chief FOIA Officer, Department FOIA Policy Staff, FOIA and Privacy Act Appeals Officer, Bureau FOIA Officer, FOIA Officer, Action Office, Office of the Secretary FOIA Officer, Electronic FOIA tracking system user, FOIA Public Liaison, Records Management Officer, or employee, in any program, office, regional office, department, bureau, or other subdivision within Interior, concerning any policies, procedures, guidelines, protocols, directives, or other instructions on the processing, assignment, handling, or disposition of FOIA requests received by Interior. These include but are not limited to records regarding the release of records, determinations regarding fee waiver requests, assignment to Action Offices, processing within Action Offices, collection and review of responsive records, approvals to release or withhold records, claims of exemption, or instructions to subject matter experts;

2. All records reflecting any communication, written or verbal, involving the Office of the Secretary, Office of the Solicitor, Head of Bureau, Director, or Deputy Director, concerning the handling, processing, or disposition of FOIA requests;

3. All records reflecting any communication, written or verbal, involving the designated Chief FOIA Officer at Interior, concerning the handling, processing, or disposition of FOIA requests;

4. All records reflecting any communication, written or verbal, between any representative of the Department's FOIA program and any FOIA Officer, Department FOIA Policy Staff, FOIA Public Liaison, the Chief FOIA Officer at

Interior, Head of Bureau, Bureau FOIA Officer, the Office of General Counsel, Bureau Office, Action Office, or the Office of Inspector General, concerning the handling, processing, or disposition of FOIA requests; and

5. All records reflecting any communication, written or verbal, to or from the designated Chief FOIA Officer at Interior, or any other FOIA Officer, concerning instituting a process for review of FOIA responses by the Interior's Office of the Executive Secretariat and Regulatory Affairs prior to their release.

Ms. Darby's and Ms. Ghios' request was received by the Office of the Secretary FOIA office on April 2, 2018, and acknowledged on April 13, 2018. We provided an initial partial response to Ms. Darby's and Ms. Ghios' request on August 30, 2018. We provided a second partial response to Ms. Darby's and Ms. Ghios' request on October 1, 2018. We provided a third partial response to Ms. Darby's and Ms. Ghios' request on October 22, 2018. We provided a fourth partial response to Ms. Darby's and Ms. Ghios' request on October 26, 2018. We provided a fifth partial response to Ms. Darby's and Ms. Ghios' request on December 6, 2018.

We are writing today to provide a sixth partial response to Ms. Darby's and Ms. Ghios' request, as clarified through subsequent discussions, and pursuant to our search and production agreement. Additional records will arrive under separate cover. We have enclosed one file consisting of 546 pages.

Of those 546 pages, 442 pages are being released in full and 104 pages contain redactions as described below.

Portions of the enclosed documents have been redacted pursuant to Exemption 5 of the FOIA (5 U.S.C. § 552(b)(5)) under the following privileges:

Attorney Work-Product
Confidential Commercial Information
Deliberative Process

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency." 5 U.S.C. § 552(b)(5). As such, the Exemption 5 "exempt[s] those documents... normally privileged in the civil discovery context." National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The exemption incorporates the privileges that protect materials from discovery in litigation. These privileges include deliberative process, confidential commercial information, attorney work-product, and attorney-client. See id.; see also Federal Open Market Committee v. Merrill, 443 U.S. 340, 363 (1979) (finding a confidential commercial information privilege under Exemption 5).

Attorney Work-Product Privilege
As incorporated into Exemption 5, the attorney work-product privilege protects from disclosure any materials prepared by or for a party or its representative (including their attorney, consultant, surety, indemnitor, insurer, or agent) in anticipation of litigation or for trial. See Judicial Watch,

Inc. v. United States Dep't of Justice, 432 F3d 366, 369 (D.C. Cir. 2005). The privilege applies once specific claims have been identified that make litigation probable; the actual beginning of litigation is not required. See Hertzberg v. Veneman, 273 F. Supp. 2d 67, 75 (D.D.C. 2003). Its purpose is to protect the adversarial trial process by insulating litigation preparation from scrutiny, as "[i]t is believed that the integrity of our system would suffer if adversaries were entitled to probe each other's thoughts and plans concerning the case." Coastal States Gas Corp. v. United States Dep't of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980). The privilege extends to administrative, as well as judicial proceedings. *See* Exxon Corp. v. United States Dep't of Energy, 585 F. Supp. 690, 700 (D.D.C. 1983). Once the determination is made that documents are protected from disclosure by the attorney work-product privilege, the entire contents of those documents are exempt from disclosure under FOIA. See Judicial Watch, 432 F3d at 370-71.

We reasonably foresee that disclosure would harm an interest protected by exemption 5. The portions of these documents that have been withheld pursuant to Exemption 5 under the attorney work-product privilege consist of notations and comments made by Department of the Interior attorneys in reasonable anticipation of litigation. As such, they contain conclusions, opinions, and recommendations of agency attorneys and are being withheld under the attorney work-product privilege of Exemption 5.

Confidential Commercial Information Privilege
When the government enters the marketplace as an ordinary commercial buyer or seller, the government information is protected from competitive disadvantage under Exemption 5. Government Land Bank v. General Services Administration, 671 F.2d 663, 665 (1st Cir. 1982). Exemption 5 prevails "where the document contains 'sensitive information not otherwise available,' and disclosure would significantly harm the government's commercial interest." Id. at 666; see also Merrill, 443 U.S. at 363.

Pursuant to the confidential commercial information privilege, conference call codes and passcodes have been withheld under Exemption 5. This information constitutes "intra-agency" documents because they are only shared with members of the Department of the Interior for the purpose of conducting official government business. Moreover, this information qualifies as "confidential commercial information" because the government entered the marketplace as an ordinary commercial buyer.

In line with Land Bank and Merrill, the information is "sensitive and not otherwise available." If the information was released, the government's financial interest would be significantly harmed. The conference calls would no longer be private since unknown, non-governmental parties would have the ability to listen in to the calls. The funds spent on purchasing the information would therefore be wasted, and the information would be of no use.

Because we reasonably foresee that the release of this information would significantly harm the government's financial interest by publicizing sensitive information, the Office of the Secretary is withholding it in accordance with Exemption 5 of the FOIA.

Deliberative Process Privilege
The deliberative process privilege "protects the decisionmaking process of government agencies"

and "encourages the frank discussion of legal and policy issues" by ensuring that agencies are "not forced to operate in a fishbowl." Mapother v. United States Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (citing Wolfe v. United States Dep't of Health & Human Services, 839 F.2d 768, 773 (D.C. Cir. 1988)). Three policy purposes have been advanced by the courts as the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. See Coastal States Gas Corp. v. United States Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The deliberative process privilege protects materials that are both predecisional and deliberative. Mapother, 3 F.3d at 1537; Access Reports v. United States Dep't of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991); Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). A "predecisional" document is one "prepared in order to assist an agency decisionmaker in arriving at his decision," and may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Maricopa Audubon Society v. United States Forest Service, 108 F.3d 1089, 1093 (9th Cir. 1997). A predecisional document is part of the "deliberative process" if "the disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

We reasonably foresee that disclosure would harm an interest protected by exemption 5. Those portions of the documents that have been withheld pursuant to the deliberative process privilege of Exemption 5 are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Therefore, their content has been held confidential by all parties. Public dissemination of this information would have a chilling effect on the agency's deliberative processes; it would expose the agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine its ability to perform its mandated functions.

Portions of the documents may be redacted pursuant to Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)) because they fit certain categories of information:

Email Addresses
Personal Phone Numbers
Personal Information

Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The

courts have held that the phrase "similar files" involves all information that applies to a particular person. Hertzberg v. Veneman, 273 F. Supp. 2d 67, 85 n.11 (D.D.C. 2003).

To determine whether releasing requested information would constitute a clearly unwarranted invasion of personal privacy, we are required to perform a "balancing test." This means that we must weigh the individual's right to privacy against the public's right to disclosure.

(1) First, we must determine whether the individual has a discernable privacy interest in the information that has been requested.
(2) Next, we must determine whether release of this information would serve "the public interest generally" (i.e., would "shed light on the performance of the agency's statutory duties").
(3) Finally, we must determine whether the public interest in disclosure is greater than the privacy interest of the individual in withholding.

The information that we are withholding consists of personal information, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency's statutory duties and that, on balance, the public interest to be served by its disclosure does not outweigh the privacy interest of the individuals in question, in withholding it. Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).

In summation, we have determined that release of the information that we have withheld would constitute a clearly unwarranted invasion of the privacy of these individuals, and that it therefore may be withheld, pursuant to Exemption 6.

Leah Bernhardi, Attorney-Advisor, in the Office of the Solicitor, was consulted in reaching this decision. Clarice Julka, Office of the Secretary FOIA Officer, is responsible for making this decision.

If you have any questions about our response to your request, you may contact Pamela Johann, Assistant United States Attorney, by phone at (415) 436-7025 or by email at Pamela.Johann@usdoj.gov.

Sincerely,

CLARICE JULKA Digitally signed by CLARICE JULKA
Date: 2019.02.11 15:33:09 -05'00'

Clarice Julka
Office of the Secretary
FOIA Officer

Electronic Enclosures